

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PETER A. SPALLUTO
and ACCESS WITH SUCCESS, INC.
Plaintiffs

Vs.

HDP, INC.,
Defendant

CIVIL ACTION NO.:
05-CV-10385-EFH

DEFENDANT HDP, INC.'s MEMORANDUM IN SUPPORT
OF ITS SECOND MOTION TO DISMISS
THE PLAINTIFFS' COMPLAINT FOR
FAILURE TO COMPLY WITH THE COURT'S
DISCOVERY ORDER

STATEMENT OF FACTS

On or about March 22, 2007, defendant HDP, Inc. moved to dismiss the above numbered complaint, following the failure of plaintiff Peter A. Spalluto to appear for his deposition, and the failure of the corporate plaintiff, Access with Success, Inc., to properly respond to the deposition notice directed toward it under Rule 30(b)(6).

Defendant respectfully invites this Court to take judicial notice of the defendant's motion, memorandum in support thereof and attached exhibits, which are part of the Court's docket in this case, and which set out the arguments made at that time.

On April 3, 2007, the Court denied the motion to dismiss and directed that the depositions proceed at a time mutually agreeable to the parties. Thereafter, the defendant contacted plaintiffs' counsel some three times, seeking dates to conduct the depositions. In October, 2007, defendant's counsel wrote to plaintiffs' counsel again asking for dates

when the plaintiffs would be available. A copy of that letter is attached hereto as Exhibit B.

Defense counsel did not receive a reply to that letter. Finally, in February 2008, the defendant served deposition notices on plaintiffs' counsel scheduling their appearance on April 16, 2008. Plaintiffs' counsel advised that Mr. Spalluto was not available on that date. Through an exchange of correspondence it became clear that Mr. Spalluto would not cooperate with the scheduling of his deposition other than at a time of his own choosing, and the defendant advised his attorney that it intended conduct his deposition on the scheduled date of April 16.

On the day before the depositions, plaintiffs moved for an order postponing them. Defendant served an opposition to the plaintiffs' motion, pointing out that in the past seven and a half years, Mr. Spalluto appears to have filed one hundred forty-one civil actions in federal courts in seven states. Indeed, he has filed eight actions in the US District Court for this District in the past three to four years. His ability to travel when it suits his purposes appears to be unimpeded, even given his disability.

This Court denied plaintiffs' motion for a protective order. However, neither plaintiff appeared for their depositions (a copy of the deposition transcript is attached to this Memorandum as Exhibit A.)

ARGUMENT

The plaintiffs' complaint should be dismissed by the Court with prejudice, forthwith. The plaintiffs' previous refusals to appear for their depositions were the subject of the defendant's earlier motion to compel their attendance, which was allowed

by the Court on January 8, 2007, with the admonition that their failure to appear would be grounds for dismissal of the complaint.

Defendant again noticed the depositions. Mr. Spalluto refused to appear altogether, and the corporate plaintiff appeared through a so-called spokesperson whose ignorance of the corporation and its affairs was sweeping.

The defendant filed a motion to dismiss the complaint which was denied by the Court on April 3, 2007 with the Court's instruction that the depositions were to proceed before the case would return to the trial list.

Defendant made several attempts to secure a date for the depositions. Those attempts were memorialized in a letter to plaintiffs' counsel attached hereto as exhibit B. There being no response to that letter, the depositions were properly noticed for April 16, 2008. Once again, both plaintiffs failed to appear.

F.R.C.P. 37 (b)(2)(C) allows the Court to dismiss the action if a party fails to obey an order to provide discovery. The appropriate sanction is dismissal, an action taken by this Court and affirmed by the 1st Circuit in the past. See, Young v. Gordon, 330 F3d 76 (1st Cir. 2003).

The Rules regarding discovery do not countenance this conduct. F.R.C.P. 37, as cited above, gives this Court the authority to dismiss the complaint for failure to comply with a discovery order. Plaintiffs have repeatedly refused to comply, and their complaint should be dismissed.

The First Circuit does not countenance such conduct. Young v. Gordon, 330 F3d 76 (1st Cir. 2003), *supra*. See also, Damiani v. Rhode Island Hospital, 704 f. 2d 12 (1st Cir. 1983); Rivera Diaz v. American Airlines, Inc., 433 F.3d 120 (1st Cir. 2005).

In Diaz, *supra*, the First Circuit, citing HMG Prop. Investors, Inc. v. Parque Industrial Rio Canas, Inc., 847 F.2d 908 (1st Cir. 1988), pointed out:

The law is well established in this circuit that where a noncompliant litigant has manifested a disregard for orders of the court and been suitably forewarned of the consequences of continued intransigence, a trial judge need not first exhaust milder sanctions before resorting to dismissal. *Op. Cit.* 847 F.2d, at 918.

Neither plaintiff is a stranger to litigation. As part of defendant's earlier motion to dismiss, it noted that Access with Success, Inc. was or is a plaintiff in 19 suits pending in federal courts in this District. As reported earlier, Mr. Spalluto has filed 141 lawsuits in federal courts in several states in the past few years, most recently about 10 days ago in New Jersey. (*Spalluto and Access 4 All, Inc., et al. v. Trahanas Realty LLC, et al.*, USDC DNJ, No.3:2008cv01754, filed 04/10/2008)

Both defendants have also been warned that the sanction of dismissal will be imposed in light of their conduct.

Wherefore Defendant HDP, Inc. moves for the entry of an order dismissing the complaint against it as to both plaintiffs, with prejudice.

Respectfully submitted,
HDP, INC.
By its Attorney,

/s/ Brian J. McMenimen

Brian J. McMenimen
BBO # 338840
Adler Pollock & Sheehan P.C.
175 Federal Street
Boston, Massachusetts 02110
(617) 482-0600
bmcmenimen@apslaw.com
Dated: April 30, 2008

CERTIFICATE OF SERVICE

I hereby certify that this document filed through ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing on April 30, 2008.

/s/ Brian J. McMenimen

Brian J. McMenimen

VOL. I

PAGES 1-7

EXHIBITS 1-5

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PETER A. SPALLUTO and)	
ACCESS WITH SUCCESS, INC.,)	
Plaintiff,)	CIVIL ACTION
)	No. 05-CV-1038EFH
vs)	
)	
HDP, INC.,)	
Defendant.)	

SCHEDULED 30 (b) (6) DEPOSITION of
ACCESS BY SUCCESS and SCHEDULED DEPOSITION of
PETER A. SPALLUTO, taken on behalf of the
defendant, pursuant to the applicable provisions
of the Federal Rules of Civil Procedure, before
David J. Mahaney, a Notary Public in and for the
Commonwealth of Massachusetts, at the offices of
Adler Pollock & Sheehan, PC, 175 Federal Street,
Boston, Massachusetts, on Wednesday, April 16,
2008, commencing at 10:11 a.m.

APPEARANCES:

Adler Pollock & Sheehan, PC (by
Brian J. McMenimen, Esq.) 175 Federal Street,
Boston, Massachusetts 02110 for the defendant.

I N D E XScheduled Depositions of:Page

ACCESS BY SUCCESS and PETER A. SPALLUTO

ExhibitsPage

No. 1	Letter 2/28/08	3
No. 2	Re-Notice of Taking Deposition	3
No. 3	Re-Notice of Taking Deposition	3
No. 4	Letter via fax 3/26/08	3
No. 5	Letter via fax and first class mail 3/27/08	3

1 (Exhibit No. 1 letter 2/28/08 marked)
2 (Exhibit No. 2 Re-Notice of Taking Deposition
3 marked)
4 (Exhibit No. 3 Re-Notice of Taking Deposition
5 marked)
6 (Exhibit No. 4 letter via fax 3/26/08 marked)
7 (Exhibit No. 5 letter via fax and first class
8 mail 3/27/08 marked)
9

10 MR. McMENIMEN: The time by my
11 watch is 11 past 10 on Wednesday, April 16,
12 2008. I am in a conference room at my offices
13 at 175 Federal Street, Boston, Mass. with the
14 stenographer, David Mahaney.

15 The plaintiff in this action, Mr.
16 Peter Spalluto, and the corporate plaintiff,
17 Access With Success, Incorporated, both
18 represented by Attorney Guerrero, are not
19 present. And for reasons that I will state in a
20 moment, I have no reason to believe that they
21 will be present and I am making this recitation
22 for the purposes of making a record of that.

23 There are a series of pre-numbered
24 deposition exhibits. Pre-numbered Exhibit 1 is

1 a letter by me to Attorney Guerrero dated
2 February 28, 2008 enclosing the two Re-notices
3 of Depositions, one of the plaintiff Access With
4 Success, Inc., and the other of plaintiff Peter
5 Spalluto both scheduled for today, one at 10
6 o'clock, one at 12 o'clock.

7 And, again, in fact believing that
8 Mr. Spalluto will not appear based upon the
9 representations of Attorney Guerrero I am going
10 to make this recitation for both depositions and
11 I shall ask the court reporter to caption this
12 as the depositions of both plaintiffs.

13 The second deposition exhibit is the
14 Re-notice of the Taking of the 30 (b) (6)
15 Deposition of Plaintiff Access With Success,
16 Incorporated, scheduled to take place at 10
17 o'clock in morning. As I mentioned earlier,
18 neither plaintiff's counsel nor any spokesperson
19 for the corporation is present.

20 The third premarked exhibit is
21 deposition Exhibit 3 which is the Re-notice of
22 the Taking of the Deposition of Peter Spalluto.
23 That deposition is scheduled for 12 o'clock.
24 However, based upon correspondence with Attorney

1 Guerrera and the fact that he has filed a motion
2 seeking a protective order to stay the taking of
3 Mr. Spalluto's deposition, I have no reason to
4 believe that Mr. Spalluto will be here at 12
5 o'clock. In fact, I'm going to suspend the
6 deposition when I complete this colloquy.

7 Deposition Exhibit No. 4 is a letter
8 which I received by email on March 26, 2008.
9 Hard copy was received in my office on March 28,
10 2008 as a letter from Attorney Guerrero to me
11 advising me that Mr. Spalluto is not available
12 on April 16, 2008 for his deposition and
13 questioning my intent to re-notice the
14 deposition of the 30 (b) (6) deposition of
15 Access With Success, Incorporated.

16 Deposition Exhibit No. 5 is my
17 response by letter dated March 27, 2008 to Mr.
18 Guerrera in which I advise Mr. Guerrero that
19 unless he can give me alternative dates that are
20 mutually acceptable to me and my clients as well
21 as his, I was going to press for the taking of
22 the depositions on the 16th, as I have tried to
23 take the deposition of Mr. Spalluto on at least
24 three or four occasions previous to this, by my

1 recollection.

2 I would note for the record that
3 yesterday afternoon I received notice by
4 electronic filing that Mr. Guerrero had filed a
5 motion seeking a protective order staying the
6 deposition alleging that his client, who is a
7 quadriplegic - Mr. Spalluto I'm talking about -
8 is unable to travel.

9 I filed an opposition to that motion
10 for protective order yesterday afternoon in
11 which I included a report from the Federal Court
12 Electronic Records System, PACER, indicating
13 that from January 1, 2000 to April 14, 2008 Mr.
14 Spalluto has filed some 141 lawsuits in, I
15 believe, eight states. So I question the candor
16 of the representation that he's unable to
17 travel.

18 By my watch it's now 10:17. I will
19 suspend this deposition pending further action
20 by the court or pending the filing of further
21 appropriate motions on behalf of the defendants.

22 (Whereupon at 10:17 a.m. the
23 scheduled depositions were suspended)

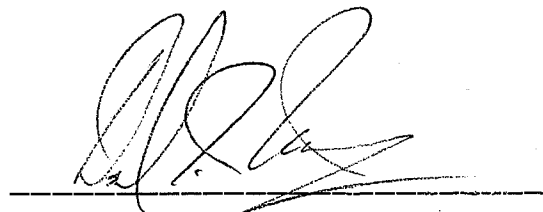
24

CERTIFICATE

Commonwealth of Massachusetts

Suffolk, ss.

I, David J. Mahaney, a Notary Public
in and for the Commonwealth of Massachusetts, do
hereby certify that the foregoing record, pages
1 through 7, inclusive, is a complete, accurate
and true transcription of my stenographic notes
taken in the aforementioned matter to the best
of my skills and ability.



David J. Mahaney

My Notary Public expires:

January 9, 2015

ADLER POLLOCK & SHEEHAN P.C.

175 Federal Street
Boston, MA 02110-2210
Telephone 617-482-0600
Fax 617-482-0604

One Citizens Plaza, 8th floor
Providence, RI 02903-1345
Telephone 401-274-7200
Fax 401-751-0604 / 351-4607

www.apslaw.com
Direct Dial No. 617-603-0510
bmcmenimen@apslaw.com

February 28, 2008

Nicholas S. Guerrero, Esq.
Shaheen, Guerrero & O'Leary, LLC
Jefferson Office Park
820A Turnpike Street
North Andover, MA 01845



Re: Spalluto et al. v. HDP, Inc.; USDC Civil Action No. 1:05-cv-10385-EFH
Our File No.: 400806-002

Dar Mr. Guerrero:

Enclosed please find the Re-Notice of Taking 30(b)(6) Deposition of Access With Success, Inc. scheduled for Wednesday, April 16, 2008 at 10:00 a.m. and Re-Notice of Taking Deposition of Peter Spalluto for Wednesday, April 16, 2008 at 12:00 p.m. Both depositions will take place at Adler, Pollock & Sheehan, 175 Federal Street, 10th Floor, Boston, MA.

Sincerely yours,

Brian J. McMenimen

BJM/elb

Enclosures

cc: Mahaney Reporting Services
Michael Paquin

446233_1.doc

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DEPOSITION
EXHIBIT

2

4/16/08

Am

PETER A. SPALLUTO and)
ACCESS WITH SUCCESS, INC.)
Plaintiff,)

CIVIL ACTION NO.: 05-cv-10385EFH

v.)

HDP, INC.,)
Defendant.)

RE-NOTICE OF TAKING 30(b)(6) DEPOSITION

To: Nicholas S. Guerrero
Shaheen, Guerrero & O'Leary, LLC
Jefferson Office Park
820A Turnpike Street
North Andover, MA 01845

Please take notice that at 10:00 a.m. on Wednesday, April 16, 2008 at the offices of Adler Pollock & Sheehan, P.C., 175 Federal Street, Boston, Massachusetts, the defendant in this action, by its attorney will take the deposition upon oral examination of Access With Success, Inc. pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, before Mahaney Reporting Services, Notary Public in and for the Commonwealth of Massachusetts, or before some other officer authorized by law to administer oaths. The defendants requests that Access With Success, Inc. designate one or more officers, directors, managing agents, or other persons who consent to being designated to testify pursuant to Fed. R. Civ. P. 30(b)(6) on the matters described in Schedule A.

You are invited to attend and cross-examine.

Respectfully submitted,
DEFENDANT HDP, INC.
By its attorney,

I hereby certify that a true copy of the above document was served upon (each party appearing pro se and) the attorney of record for each (other) party by mail (by hand) on


Brian McMenimen, BBO # 338840
ADLER POLLOCK & SHEEHAN, P.C.
175 Federal Street
Boston, MA 02110
(617) 482-0600 Telephone
(617) 482-0604 Facsimile

Dated: February 28, 2008
446225_1.doc

Schedule A

1. Every matter and assertion alleged in the plaintiffs' complaint, including the factual basis for the assertion appearing in paragraph 24 that HDP, Inc. has made renovations to the premises since January 26, 1992.
2. The identity of persons who have personal knowledge of the matters alleged in the complaint.
3. the activities of the plaintiff with respect to other claims made or actions commenced by it under the Americans with Disabilities Act.

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

**DEPOSITION
EXHIBIT**

3
4/16/08 *DM*

**PETER A. SPALLUTO and
ACCESS WITH SUCCESS, INC.**

Plaintiff,

v.

**HDP, INC.,
Defendant.**

CIVIL ACTION NO.: 05-cv-10385EFH

RE-NOTICE OF TAKING DEPOSITION

**To: Nicholas S. Guerrera
Shaheen, Guerrera & O'Leary, LLC
Jefferson Office Park
820A Turnpike Street
North Andover, MA 01845**

Please take notice that at 12:00 p.m. on Wednesday, April 16, 2008 at the offices of Adler Pollock & Sheehan, P.C., 175 Federal Street, Boston, Massachusetts, the defendant in this action, by its attorney will take the deposition upon oral examination of Peter Spalluto pursuant to the Federal Rules of Civil Procedure, before Mahaney Reporting Services, Notary Public in and for the Commonwealth of Massachusetts, or before some other officer authorized by law to administer oaths.

You are invited to attend and cross-examine.

Respectfully submitted,
DEFENDANT, HDP, INC.
By its attorney,

I hereby certify that a true copy of the above document was served upon (each party appearing pro se and) the attorney of record for each (other) party by mail (by hand) on

[Signature]
Brian McMenimen, BBO # 338840
ADLER POLLOCK & SHEEHAN, P.C.
175 Federal Street
Boston, MA 02110
(617) 482-0600 Telephone
(617) 482-0604 Facsimile

Dated: February 28, 2008

SHAHEEN GUERRERA & O'LEARY, LLC

Jefferson Office Park
820A Turnpike Street

North Andover, Massachusetts 01845

Telephone: (978) 689-0800 Toll Free: (866) 665-5834

Facsimile: (978) 794-0890

E-mail: nguerrera@sgolawoffice.com

RECEIVED
ADLER POLLOCK & SHEEHAN PC, INC.

MAR 28 2008

March 26, 2008



COPY

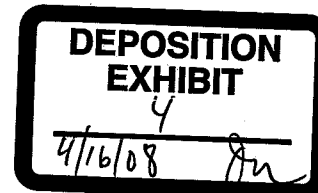
BY FAX 617-482-0604 AND FIRST CLASS MAIL

Brian J. McMenimen, Esq.

Adler, Pollock & Sheehan, P.C.

175 Federal Street

Boston, MA 02110-2890



RE: *Peter A. Spalluto, et al. v. HDP, Inc.*,
U.S.D.C. Civil Action Number: 05-10385EFH

Dear Mr. McMenimen:

I am writing to you in regard to the deposition notices of Mr. Spalluto and Access with Success.

Mr. Spalluto is not available on April 16, 2008. He will be available for a deposition in Boston on July 28 through 31, or August 1 and August 4, 2008. Your courtesy in agreeing to reschedule his deposition to one of those dates will be appreciated.

In regard to the deposition of Access with Success, I do not understand why the defendant wants or needs a second deposition. The defendant took that party's deposition on January 24, 2007. The schedule of the subject matter for inquiry matches the previous inquiry. I would like to have a conference with you pursuant to Local Rule 7.1 before moving for a protective order. I called and left a message with you on Tuesday for that purpose.

Please call me regarding these matters. Thank you.

Very truly yours,

Nicholas S. Guerrero
Nicholas S. Guerrero

NSG:ljr

ADLER POLLOCK & SHEEHAN P.C.

175 Federal Street
Boston, MA 02110-2210
Telephone 617-482-0600
Fax 617-482-0604

One Citizens Plaza, 8th floor
Providence, RI 02903-1345
Telephone 401-274-7200
Fax 401-751-0604 / 351-4607

www.apslaw.com

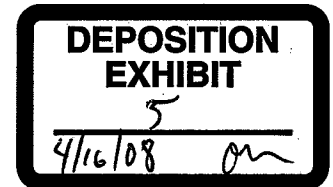
March 27, 2008

Writer's Dir. Dial: 617-603-0510

Writer's email: bmcmenimen@apslaw.com

Nicholas S. Guerrero, Esq.
Shaheen, Guerrero & O'Leary, LLC
Jefferson Office Park
820A Turnpike Street
North Andover, MA 01845

Via Fax and First Class Mail
Fax: 987-794-0890



Re: Spalluto et al. v. HDP, Inc.; USDC Civil Action No. 1:05-cv-10385-EFH
Our File No.: 400806-002

Dear Attorney Guerrero:

I received your letter dated March 26, 2008 informing me that Mr. Spalluto is not available for his deposition on April 16, 2008. Interestingly, the dates you have suggested as comports with his schedule are approximately the same dates you proposed a year ago.

I will be out of the office this year, as I was last year, on the dates you have offered. I will be away from July 28 to August 11, 2008. I cannot change the dates and they represent a trip that I have already paid for.

I am willing to compromise with you on the date, provided your client makes himself available in April, May, or even June. Candidly, I do not believe Judge Harrington would agree to a postponement of the deposition until July, but I can't agree to that long a postponement anyway.

For the record, I am not going to cancel the depositions currently scheduled for April 16, 2008 at this time, but I will await hearing from you as to alternative dates.

As for the 30(b)(6) of Access with Success, Inc., I do not want to reiterate the issues that I had with Mr. Theodore's appearance as spokesperson at this point. I invite you to reread my motion to dismiss if you are unclear as to why I want to conduct the deposition of that entity. I seem to recall that in your opposition to my motion you indicated that you would not have a problem with that.

Lastly, I did not understand from your message, left on my voicemail, that you wanted to have a conference under the local rules.

ADLER POLLOCK & SHEEHAN P.C.

March 27, 2008

Page 2

When would you like to have that conference?

Sincerely yours,

Brian McMenimen

ADLER POLLOCK & SHEEHAN P.C.

175 Federal Street
Boston, MA 02110-2210
Telephone 617-482-0600
Fax 617-482-0604

One Citizens Plaza, 8th floor
Providence, RI 02903-1345
Telephone 401-274-7200
Fax 401-751-0604 / 351-4607

www.apslaw.com

October 19, 2007

Writer's Dir. Dial: 617-603-0510

Writer's email: bmcmenimen@apslaw.com

Nicholas S. Guerrero, Esq.
Shaheen, Guerrero & O'Leary, LLC
Jefferson Office Park
820A Turnpike Street
North Andover, MA 01845

Re: Spalluto et al. v. HDP, Inc.; USDC Civil Action No. 1:05-cv-10385-EFH
Our File No.: 400806-002

Dear Attorney Guerrero:

I am writing to ask you for dates when your client, Mr. Spalluto, will make himself available for his deposition.

I believe that I have asked you on two or three occasions for some dates, following your proposed dates in August, when I was away on vacation. If cold weather is a concern for your client, I would like to get the deposition in within the next month.

Would you please give me some dates when your client will be available?

Sincerely yours,

Brian McMenimen